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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 224

GEORGE S. RHODES, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on January 12, 1962.

CITATION TO OPINION BELOW

The opinion of the United States Court of Claims (R. 72) is printed in Appendix B hereto, *infra* p. 4a.

JURISDICTION

The judgment of the United States Court of Claims was entered on January 12, 1962 (R. 72). Reconsideration was denied on April 4, 1962 (R. 84). The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1255(1).

QUESTIONS PRESENTED

1. Whether the Director of the Central Intelligence Agency is not bound by validly promulgated regulations governing the dismissal of an employee even though such regulations restrict the authority of the Director which authority was delegated by statute enacted by the Congress of the United States.

2. Whether it is not mandatory for the United States Civil Service Commission to review an appeal of a discharged employee when such an appeal is based in part on an allegation of violation of regulations of an Agency concerning the discharge of an employee.

3. Whether an Agency may refuse to provide a copy of administrative regulations governing dismissal of an employee when the Agency proposes to discharge an employee pursuant to such regulations.

4. Whether an Agency may deny the right to counsel to an employee whose dismissal is proposed which dismissal is based on administrative hearings conducted within the Agency.

STATUTE INVOLVED

The statutory provision involved is based on Section 14 of the Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 5 U.S.C. 851 et seq.

REGULATIONS INVOLVED

Agency Regulation 20-705, as it was in effect prior to January 30, 1959.

Civil Service Commission Regulation found at Part 21 of Chapter Z1 Section 21.10 of the Federal Personnel Manual.

STATEMENT

Petitioner was employed in the Central Intelligence Agency as a Grade GS-12, Analyst prior to his dismissal therefrom which dismissal was effective on March 16, 1959. Petitioner first learned of the possibility of his being dismissed in November of 1958 in a conversation with the Director of Personnel (See Exhibit "A", R. 8 herein). Exhibits "B" through "K" attached to plaintiff's complaint (R. 9-19) reflect the series of events as they transpired in the Agency up to the time of his dismissal. It is significant to note that no mention of dismissal pursuant to Section 102 (c) of the National Security Act of 1947, was made until February 13, 1959, when the petitioner was so informed as reflected in Exhibit "J" attached to petitioner's complaint (R. 18). Prior to this date petitioner has been led to believe that he was to be dismissed pursuant to the "Selection Out" Program of the Agency procedures for which were set forth in detail by the Director of Personnel in a memorandum dated January 6, 1959, copy of which is attached to petitioner's complaint as Exhibit "E" (R. 12-13).

Following petitioner's dismissal by the Agency he appealed to the U. S. Civil Service Commission which refused to review the dismissal action because it claimed that it had no authority to so act under Section 102 (c) of the National Security Act of 1947. The Civil Service Commission further refused to review the dismissal of the plaintiff to determine whether the Agency had followed its own procedures in dismissing the plaintiff.

Petitioner filed suit in the United States Court of Claims on September 1, 1960, which Court by decision dated January 12, 1962 (R. 72-77), Appendix B, *infra* p. 4a denied petitioner's claim. On March 13, 1962, petitioner filed a motion for reconsideration (R. 78) and on April 4, 1962, the Court denied the motion without opinion (R. 84).

REASONS FOR GRANTING THE WRIT

1. This Court has ruled in the case of *Service* v. *Dulles*, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, even though the administrative action to which the regulations pertain is discretionary in nature. The instant matter is identical with the case of Mr. Service in that the Director of the Central Intelligence Agency restricted his authority granted by Congress which enabled him to summarily dismiss any employee. This restriction is identical with the restriction with which the Secretary of State burdened himself in the case of *Service* v. *Dulles, supra.* The Courts have held that discretionary authority, as is here involved, cannot be abused; that decisions with such authority must not be made arbitrarily. *Crocker* v. *United States*, 130 Ct. Cls. 567, 574, 127 F. Supp. 568, 572 (1955). In this suit the petitioner has contended and again herein contends that the act of the Director of the Central Intelligence Agency was arbitrary when he refused to follow administrative regulations validly enacted by him for the purpose of granting greater protection to his employees than the law required.

The Director of the Agency herein laid down express rules to guide his subordinates and himself in exercising the sovereign power which the statute has assigned to his discretion. Petitioner thus invokes the principle which this Court has enunciated in a line of cases beginning with *Accardi* v. *Shaughnessy*, 347 U.S. 260, and running through *Service* v. *Dulles, supra, Watson* v. *United States*, 162 F. Supp. 755 (Ct. Cls. 1958) and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Mr. Justice Frankfurter has epitomized the principle by saying that "he that takes the procedural sword shall perish with that sword". *Vitarelli* v. *Seaton, supra*, at 547. The Director of the Agency cannot promulgate regulations governing dismissal actions and then

initiate a dismissal thereunder and in the middle of the process elect to ignore his own regulations. The memoranda attached to petitioner's complaint in the United States Court of Claims (R. 8 through 26) reflect a course of action by the Director of Personnel of the Agency which was inconsistent with the action as finally taken. Such action is inconsistent with the doctrine laid down by this Court in the *Service* and *Watson Cases*, hereinbefore cited. Such inconsistency with the law of the land as enunciated by this Court must result in a reversal of the decision below and an entry of judgment by the lower Court that is consistent with this Court's prior rulings.

2. The case of *Watson* v. *United States, supra*, is further dispositive of the issue that the United States Civil Service Commission is obligated by judicial fiat to adjudicate an issue on an appeal where such issue is the allegation that the Agency involved has failed to follow its own regulations. This same issue was similarly adjudicated in the case of *Service* v. *Dulles, supra*, and yet the Civil Service Commission herein refused to review such an allegation and like the proverbial ostrich with its head in the sand blatantly ignored the ruling of this Court in *Service* v. *Dulles*, and *Watson* v. *United States, supra*. Such ignorance is not due from a lack of knowledge but rather from a lack of administrative intestinal fortitude. It is easy to force an employee into the Courts when to properly act would raise a furor within the Executive Department of the Government of the United States. The concept that ours is a nation of men and not one of laws has become the convenient rubber stamp by which the Civil Service Commission ignores the rights of man for the expedient purpose of avoiding a clash between the heads of Agencies within the Executive Branch of the Government. Such expediency on the part of the Commission is arbitrary and defiant of the rulings of this Court on such matters.

3. The Agency herein has contended (R. 13) that there were no written regulations to be given to employees governing dismissal action yet there had been promulgated Regulation 20-705 which specifically set forth that all persons entitled to Veterans Preference as set forth in the Veterans' Preference Act of 1944, as amended, would receive the same protection even though they had not been employed for a period of a year as the law required. Counsel for the Government in his oral argument before the United States Court of Claims conceded that Regulation 20-705 had been changed as of January 30, 1959, but that the form thereof was unknown to counsel prior to the said date. We have seen that the Agency contended that only regulation 20-740 was involved in the petitioner's dismissal and yet the brief of respondent below reflected that there was a Regulation entitled 20-705. Why did the Agency deliberately misstate the facts? It is submitted that a disclosure by the Agency to petitioner of all regulations involved herein would have resulted in the petitioner being able to successfully retain his position with the Agency. Such a denial by the Agency was arbitrary and inconsistent with the doctrine of "Fair Play" again reflected in *Service* v. *Dulles* and *Watson* v. *United States, supra.* It is submitted that such action was violative of the administrative rights which petitioner was entitled to receive under the Agency Regulations.

4. The Agency had advised petitioner of his right to be heard at administrative hearings held within the Agency but denied to him the right to counsel to represent petitioner at such hearings (R. 15). A right to a hearing cannot be in the interest of justice when it is stripped of all semblance of being a fair hearing. To set petitioner before the "administrative wolves" in a star chamber proceeding without counsel is the equivalent of a meal without food, a body without a heart and a Government without laws. The core of protection and the opportunity to be

fairly and impartially heard at any administrative hearing is the right to be represented by counsel. The denial of such a right is an abuse of discretion and again violative of the principles laid down in the *Service* and *Watson* cases, *supra* and is a denial of administrative due process of law and should invalidate petitioner's dismissal. The United States Court of Claims did not rule affirmatively on this matter and petitioner submits that such failure is reversible error.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. WITSIL
Counsel for Petitioner

July 3, 1962